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CITATIONS

248-409—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

W. WILLARD WIRTZ, SECRETARY OF LABOR, PETITIONER

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL–CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 13–17, *infra*) is unreported. The opinion and judgment of the district court (App. C, pp. 19–30, *infra*) are reported at 244 F. Supp. 745. The order of the district court on plaintiff's motion for post-judgment relief (App. D, pp. 31–32, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, p. 18, *infra*) was entered on December 16, 1966. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action by the Secretary of Labor challenging a union election under Title IV of the Labor-management Reporting and Disclosure Act of 1959 is rendered moot if a subsequent election is held by the defendant union.[1]

STATUTE INVOLVED

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, are set forth in Appendix F, pp. 44–47, *infra*.

STATEMENT

The Secretary of Labor instituted this action on March 31, 1964, under Section 402 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 482, requesting an order setting aside an election conducted by the respondent union on October 18, 1963, and directing that a new election, to be supervised by the Secretary, be held. The complaint specified that the union had violated Section 401(e) of the Act, 29 U.S.C. 481(e), which directs that every member of a labor organization subject to the Act "be eligible to be a candidate and to hold office (subject to * * * reasonable qualifications uniformly imposed) * * * " (p. 44, *infra*). It was stipulated

[1] If certiorari is granted, we also reserve the right to argue the question not reached by the court below—*i.e.*, whether the Secretary failed to establish that the violation of the Act "may have affected the outcome" of the election within the meaning of Section 402(c)(2), 29 U.S.C. 482(c)(2).

that the union constitution and bylaws required candidates for union office to have attended 75 percent of the monthly union meetings in the two years prior to the election, that members were not excused on account of illness but only if they were required to be at work when the union meetings were held, and that excuses had to be submitted in writing to the union's secretary within 72 hours of the missed meeting. As a consequence of these requirements, it was stipulated, only 11 members of the 500-member union were eligible to run for office in 1963 (R. 31a–33a).[2]

This action was instituted after the Secretary had received and investigated a complaint from a union member who was disqualified as a candidate because he had attended only 17 of the 24 relevant monthly meetings. The minutes of one of the seven meetings which he missed indicated that the complaining member had been hospitalized on the occasion of that meeting (R. 32a–33a). The union had failed to act on the member's internal complaint (R. 29a–30a).

The district court held that the 75 percent attendance requirement violated the "reasonable qualification" provision of Section 401(e) because 75 percent was too high a percentage, the provision governing excuses was too limited and the effect of the rule was too restrictive (pp. 19–29, *infra*). Notwithstanding this conclusion, the court denied the relief requested by the Secretary on the ground that the plaintiff had failed to establish that the violation "may have af-

[2] "R." refers to the Appendix to the Secretary's brief in the court of appeals.

fected the outcome" of the election as required by Section 402(c)(2) (p. 46, *infra*). The court noted that the complaining member had voluntarily absented himself from other meetings when he was not ill, and held that his failure to qualify was therefore attributable to a factor other than the unreasonable requirement (p. 29, *infra*). It therefore dismissed the complaint, although it "retain[ed] jurisdiction" for further action "in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union" (p. 30, *infra*). The Secretary appealed from the judgment of dismissal.

The union's next regular election was held in October 1965. On the Secretary's motion, the court of appeals remanded the case to the district court for it to take evidence concerning that election (R. 44a). The Secretary submitted to the district court an affidavit stating that the 75 percent attendance requirement had remained in effect during the 1965 election; that only 2.6 percent of the membership was therefore eligible to run for office; that only eight candidates ran for the eight union offices (only one running for president and no candidates being nominated for three of the offices); that no members were nominated who were ineligible under the 75 percent rule; and that the rule was not waived on behalf of any nominee (R. 47a–50a). The district court denied the Secretary's motion to have the 1965 election declared invalid (pp. 31–32, *infra*).

Relying on the decision of the Court of Appeals for the Second Circuit in *Wirtz* v. *Local Unions 410, 410A,*

410B & 410C, International Union of Operating Engineers, 366 F. 2d 438 (App. E, pp. 33–43, *infra*), the court of appeals held that the challenge to the 1963 election was mooted by the intervening 1965 election. The court also held that it was proper to deny relief as to the 1965 election because no complaint had been received by the Secretary of Labor with regard to that election (pp. 15–16, *infra*).

REASONS FOR GRANTING THE WRIT

In deciding that the intervening union election rendered the Secretary's action moot, the court below misapprehended the nature of the remedy afforded by Title IV of the Labor-Management Reporting and Disclosure Act and arrived at a result which would make the rights protected by that title virtually unenforceable. The Second and Sixth Circuits have recently reached the same conclusion as the court below,[3] and unless this trend of decisions is reversed the remedial statutory provisions enacted by Congress in 1959, after substantial legislative investigation and debate, will come to naught.

1. The court of appeals committed a fundamental error in reading the statute; it accorded to the Secre-

[3] *Wirtz* v. *Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers,* 366 F. 2d 438 (C.A. 2), Appendix E, pp. 33–43, *infra; Wirtz* v. *Local Union No. 125, Labbrers' International Union of North America, AFL–CIO,* decided December 15, 1966 (C.A. 6). We are today filing a petition for a writ of certiorari in the latter case. We are not seeking review of the Second Circuit decision because that litigation has been dismissed under the terms of an agreement between the Secretary and the International Union of Operating Engineers which incorporates remedial provisions for the future.

tary only half the remedial powers conferred upon him by Section 402(b). The statute (p. 46, *infra*) authorizes the Secretary to bring a civil action (1) "to set aside the invalid election, if any," and (2) "to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe." The court below assumed that merely because it would serve no purpose to declare the 1963 election invalid, the Secretary's entire action became moot. The statute did more, however, than merely entitle the Secretary to maintain actions to invalidate elections; it authorized him, whenever an invalid election had been held, to obtain a court order directing a remedial supervised election. That remedy is available and appropriate even if the terms of the officers chosen by the invalid election have expired.

It is clear from the legislative history of the Labor-Management Reporting and Disclosure Act that the remedial provisions of Title IV were designed to protect the public interest in democratic labor unions and not merely to enforce an individual right asserted by a complaining union member. See S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 20. It was to protect the public interest along with the right of union members to free and fair elections that Congress authorized the Secretary to bring suit to invalidate an unlawful election and to conduct a supervised one. Congress' purpose in adding the supervised election—which must comply not only with the statute itself but

also with "such rules and regulations as the Secretary may prescribe"—as a remedy must have been to undo the possible lasting effects of an invalid and unlawful election. Those effects are not dissipated merely because the union has held a subsequent election.

The facts of this case demonstrate persuasively why a supervised election is a necessary and integral element of the relief provided by the Act. The Secretary proved on remand that at the union's 1965 election the same unreasonable provision of the union's bylaws had been in effect and that, as a consequence, only 13 of 500 members were eligible to run for office. Only 8 candidates actually ran, and no one who failed to meet the 75 percent attendance provision was even nominated. It is a fair inference that the outstanding bylaw was a deterrent to other potential candidates who might have sought to run if it had been clearly established that the condition was impermissible. Indeed, even if the union had not actually applied its unlawful condition of candidacy, there would have been no way of being certain, short of a supervised election, that the union members had been adequately notified of the elimination of the unreasonable attendance requirement.

An even more basic justification for a supervised election, which applies irrespective of whether an unreasonable qualification was imposed during the intervening vote, is the importance of overcoming the inherent advantages which the unlawfully elected officers enjoy as incumbents. The procedures which the Secretary utilizes in conducting a supervised elec-

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tion are designed to eliminate or minimize such unfair advantages. Without supervised elections, those who have been illegally chosen might perpetuate themselves in office through their control of the election machinery, using techniques which are not demonstrably unlawful but which nonetheless favor incumbents. If no supervised election is conducted to break this cycle of control, a single invalid election may taint several which follow it.[4]

The court of appeals was wrong, therefore, in concluding that merely because the allegedly invalid election had been superseded, the Secretary was entitled to no relief. If, as was alleged in the complaint, the

[4] The details of a union election are usually controlled by an election committee or similar body, and incumbent officers may be members of the committee. At a supervised election, the principal details of the election procedure are determined by the Department of Labor's supervisor, in consultation with all interested parties at a pre-election conference. Details remaining unsettled after the pre-election conference may be left to a union election committee, but the supervisors are instructed that incumbent officers seeking re-election, as well as other candidates for office, are not to serve on the election committee. Where the union's constitution requires incumbent officers to perform functions in connection with the election, the supervisors are instructed that the incumbent seeking re-election must do so under supervision and, upon request, under observation of representatives of rival candidates.

An example of an election procedure which may affect the outcome of a close race is placement of the candidates' names on the ballot, the first place being generally considered preferable. Some unions list candidates in order of nomination. This frequently results in incumbents being listed first because the incumbent officer who chairs the nomination meeting may recognize the nominators of his own slate first. The Department of Labor supervisors are instructed that alphabetical listing on the ballot, or a listing based on chance, is preferable.

1963 election was unlawfully conducted, a supervised election should have been ordered. The fact that the union conducted a regular election in the interim did not obviate the need for that remedy.

2. If the circumstances on which the court below relied are sufficient to render the case moot, very few, if any, actions brought by the Secretary to effectuate the voting rights enumerated in Title IV can be prosecuted to a successful conclusion. The Act itself requires unions to hold elections at least once every three years (29 U.S.C. 481(b)); many unions (including respondent) hold them biannually, and some even conduct annual elections. The Secretary cannot, under normal circumstances, institute an action in a district court until six months after an election.[5] In most cases, a trial is necessary, so that even the district court's judgment may be delayed until after the following regular election. And if appeals are prosecuted, it becomes virtually impossible to terminate the litigation (including action on an application for review by this Court) before the next biannual or even triannual union election. This situation obviously will be further aggravated if defendant unions know that they can moot these lawsuits by delaying the proceedings until their next election is held.

At the present time there are 28 actions of this kind pending in the district courts; three others have

[5] The union has three months after the invocation of internal remedies in which to render a final decision. 29 U.S.C. 482(a). The union member then has one month in which to file a complaint with the Secretary. *Ibid.* The Secretary then has sixty days for the administrative investigation which is required prior to bringing suit. 29 U.S.C. 482(b).

been recently dismissed as moot on the authority of the decisions in this and the related cases. Two of the 28 cases are also subject to dismissal on the same ground, as is one case now pending in a court of appeals. In five other district court cases, the union is scheduled to hold its next regular election during this year. In all the remaining cases elections are to be held in 1968 or 1969, and the prospects for terminating the litigation, including appellate review, before these elections are held are exceedingly slim. Consequently, the Secretary faces the prospect of wholesale dismissal of these lawsuits before they reach final judgment.

It is no answer to suggest, as the court below and the Second Circuit have done, that the Secretary should obtain temporary injunctions against elections which might moot such actions. While the Act does not explicitly authorize injunctions prohibiting the holding of union elections, the Court of Appeals for the Second Circuit has directed the issuance of such an injunction. *Wirtz* v. *Local Unions Nos. 545, 545–A, 545–B & 545–C, International Union of Operating Engineers,* 366 F. 2d 435. In any event, by taking such a step the Secretary is, in effect, asking a court to maintain in office the very union officials whose election he is challenging. Congress surely did not contemplate placing the Secretary in that anomalous position in order to obtain an adjudication of his challenge to an election and his demand for a supervised ballot.

Nor is the policy of the Act served by encouraging the Secretary to act in haste. The Secretary is directed by 29 U.S.C. 482(b) to ascertain whether violations disclosed by his investigation have been remedied.

He may then bring suit if he does not obtain voluntary compliance with the terms of the statute.[6] See *Calhoon* v. *Harvey*, 379 U.S. 134, 140. Settlement efforts frequently take time, and the Secretary may obtain waivers in order to permit the negotiations to extend past the sixty-day period prescribed by the Act for bringing suit.[7] The possibility of mootness, however, would encourage the Secretary to file suit as quickly as possible, regardless of the effect on settlement efforts.[8] The net effect would be to postpone, and perhaps to frustrate permanently, the correction of undemocratic election procedures which might otherwise be achieved by voluntary compliance.[9]

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[6] In fiscal years 1963, 1964 and 1965, an average of 31 complaints per year were disposed of through voluntary compliance, while an average of 17 suits per year were filed. See Bureau of Labor-Management Reports, *Summary of Operations, 1963*, at p. 11; U.S. Department of Labor, *Summary of Operations, 1964, Labor-Management Reporting and Disclosure Act*, at p. 6; U.S. Department of Labor, *1965 Summary of Operations, Labor-Management Reporting and Disclosure Act*, at p. 7.

[7] In some cases, the holding of a supervised election is part of the settlement. Considerable time must be taken in preparing for the supervised election, during which time the Secretary preserves his right to file a complaint by obtaining waivers of the limitations defense.

[8] Settlement efforts may, of course, continue after the filing of a suit. However, the commencement of litigation generally hardens the position of the parties and makes settlement more difficult. Before suit is filed, the union may be amenable to settlement because it wishes to avoid the adverse publicity of a lawsuit. This factor, of course, disappears once the suit is filed.

[9] The district court also erroneously decided the question not reached by the court of appeals which we reserve for argument if certiorari is granted (note 1, *supra*). The standard of the statute is satisfied if it is *possible* that the violation affected the election. The words "may have affected" were in-

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1967.

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serted in the statute precisely to overcome the very strict proximate-cause approach adopted by the district court. Senator Goldwater analyzed the provision as follows (105 Cong. Rec. 19765):

> The Kennedy-Ervin bill (S. 505), as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless. Minority members in committee secured an amendment correcting this glaring defect and the amendment is contained in the conference report.

The Second Circuit has also disagreed with the result reached here by the district court. *Wirtz* v. *Local Unions 410, 410A, 410B & 410C, International Union of Operating Engineers*, 366 F. 2d 438, pp. 39–41, *infra*.

APPENDIX A

[Caption Omitted]

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed December 16, 1966)

By HASTIE, *Circuit Judge:* Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 534, 29 U.S.C. § 482(b), provides in part that whenever the Secretary of Labor's investigation of a complaint made by a member of a local union gives him probable cause to believe that rights to be a candidate or to vote in an election of union officers, or to hold union office, as protected by section 401 (b) and (e) of the Act, have been violated, the Secretary "shall * * * bring a civil action against the labor organization * * * to set aside the invalid election * * *." This is such an action. The complaint filed in March, 1964, alleges that, through investigation of a complaint by a union member, the Secretary has found probable cause to believe that Glass Bottle Blowers Local 153 violated section 401 (b) and (e) of the 1959 Act in its 1963 nomination and election of union officers. The complaint asks for a judgment "declaring the election held by the defendant union on October 18, 1963, to be null and void" and "directing the conduct of a new election under the supervision of the plaintiff".

After pretrial procedures extending over more than a year, the case was tried to the district court without a jury. In August, 1965, the court filed an opinion and caused judgment to be entered dismissing the complaint. The court found that the union's international constitution and local by-laws unlawfully restricted the eligibility of members to be candidates for union office. However, it also found that the evidence did not establish that this violation "may have affected the outcome" of the 1963 election, a requirement which section 402(c) expressly makes prerequisite to the judicial granting of relief.

The Secretary appealed from this judgment. However, while this appeal was pending, he also sought and obtained from this court an order remanding the cause to the district court, without relinquishing jurisdiction for the review of the original judgment, for the purpose of entertaining and adjudicating a post-judgment motion for further relief.

Upon remand, the Secretary filed a post-judgment motion alleging under oath that the union had elected new officers on October 12, 1965 under the same restrictions upon eligibility for office that had been the subject of the complaint with reference to the 1963 election and asking that the 1965 election be invalidated and a new election ordered under the Secretary's supervision. The court denied this motion, ruling on the merits of the motion "that no candidate or candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations."

The case is now before us upon separate appeals from the original judgment and from the order denying the post-judgment motion.

We hold that the 1965 election of officers, as disclosed in the post-judgment motion, made the original

action challenging the 1963 election moot. This question has very recently been considered and decided by the Court of Appeals for the Second Circuit. *Wirtz v. Local Unions 410, 410A, 410B, & 410C, Int'l. Union of Operating Engineers,* 1966, 366 F. 2d 438. That court reasoned as follows:

> The exclusive remedy which Congress has created for challenging a union election, see 29 U.S.C. § 483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election * * *
>
> * * * It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election * * * we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot. 336 F. 2d. at 442.

To us this reasoning is persuasive and requires no elaboration. The Secretary's original action, based upon the 1963 election, is now moot.

We have also considered the so-called post-judgment motion as in substance an amended or supplementary complaint attacking the 1965 election. However, that new challenge to the 1965 election must fail because no member of the union has filed with the Secretary a complaint seeking to invalidate that election.

For whatever reasons, Congress, in enacting the enforcement provisions contained in section 402, did no more than to provide an administrative and judicial procedure for determining the legality of a particular election of local union officers. The only suit authorized under section 402 is a suit by the Secretary to

set aside that election of which an aggrieved unionist has complained. *Wirtz* v. *Local Unions 410, 410A, 410B, 410C, Int'l. Union of Operating Engineers, supra; Wirtz* v. *Local 191, Int'l. Brotherhood of Teamsters,* D. Conn. 1963, 218 F. Supp. 885, aff'd, 2d Cir. 1963, 321 F. 2d 445. Therefore, absent a complaint by a union member challenging the 1965 election, the Secretary had no authority to sue to establish the invalidity of that election. The denial of the post-judgment motion was proper, although we so decide for a reason different from that given by the court below.

While this action must be dismissed, we think it appropriate to make the additional observation that it is within the power of the Secretary to prevent such a controversy as was presented by his original complaint here from becoming moot. The available remedy, as pointed out by the Court of Appeals for the Second Circuit, is a proceeding "to enjoin a union from holding an election, or from giving effect to one already in process, where it is apparent that the Secretary is likely to succeed in his claim that the election under which the union's officers are currently serving was conducted in violation of the requirements of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481, where the impending balloting is apparently being conducted under substantially similar conditions, where it also appears that such injunction will not cause serious injury to the unions concerned, and where the Secretary is likely to suffer a very real detriment in his attempt to enforce the law if such restraining order is not granted". See *Wirtz* v. *Local Unions Nos. 545, 545–A, 545–B and 545–C, Int'l. Union of Operating Engineers,* 2d Cir. 1966, 366 F. 2d 435, 436. The court directed that the requested injunction issue.

In addition to granting such relief, we are sure that this court and the district courts in this circuit will, upon request, expedite the hearing and disposition of cases in which the Secretary challenges the validity of union elections in order that disruptive disputes over the right and title of union officers may not be unduly protracted.

Finally, the Secretary contends that, in ruling adversely upon his contention that the illegal disqualification of candidates "may have affected the outcome" of the 1963 election, the district court misconstrued the statute and treated it as requiring proof that the illegal conduct did in fact affect the outcome of the election. The mootness of the controversy makes it unnecessary to decide that question. However, we think we should not permit the decision below to stand as a precedent on this contested issue which we have declined to review.

Accordingly, the judgment on the merits of the principal controversy and the order denying post-judgment relief will both be vacated and the cause remanded with instructions to dismiss the original complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union member.

A True Copy.

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

[Caption Omitted]

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed August 26, 1965, and the order denying post-judgment relief, filed May 27, 1966, be, and the same are hereby vacated and the cause remanded with instructions to dismiss the original complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union member.

Attest:

IDA O. CRESKOFF, *Clerk.*

DECEMBER 16, 1966.

APPENDIX C

[Caption Omitted]

OPINION OF DISTRICT COURT, FILED AUGUST 26, 1965

Dumbauld, J.

The question for decision here is whether a provision requiring attendance at 75% of the regular meetings of a union for a two-year period since the last previous election in order to be eligible as a candidate for office in the union is or is not among the "reasonable qualifications" permitted by Section 401(e) of the Labor-Management Reporting and Disclosure Act of September 14, 1959 (commonly known as the Landrum-Griffin Act), 73 Stat. 532, 29 U.S.C. 481(e).

That section provides:

> (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and *every member in good standing shall be eligible* to be a candidate and *to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed)* and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof.[1]

[1] Italics supplied. Section 504, not pertinent here, prohibits holding of union office by Communists or convicts guilty of certain crimes. Incidentally, section 504 was held unconstitu-

Section 402, 29 U.S.C. 482, provides enforcement procedure. Upon investigation of a complaint duly filed by a member of a labor organization, the Secretary of Labor, if he finds probable cause to believe that a violation of the election provisions of the Act has occurred and has not been remedied, may bring a civil action, against the union as an entity, to set aside the election and direct the conduct of an election under supervision of the Secretary.

If, upon a preponderance of the evidence after a trial upon the merits, the Court finds that the violation of Section 401, "may have affected the outcome of an election," the Court shall declare the election to be void and direct the conduct of a new election under the supervision of the Secretary.

It will be noted that the Court, in order to declare the election void, must find not only the existence of a violation but that the violation may have affected the outcome of the election.

The Court is vested with specific statutory jurisdiction in a proceeding *de novo* styled a civil action. This remedy is exclusive. *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

The Court is not exercising the function of judicial review of an administrative agency, where the doctrine of "primary jurisdiction" would apply, and the scope of review would ordinarily be limited to the question of whether there was error or lack of substantial evidence to support the agency's conclusions. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907); *Rochester Tel. Corp.* v. *U.S.* 307 U.S.

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tional by the Supreme Court in *U.S.* v. *Brown*, 381 U.S. 437, 449 (1965) as being a bill of attainder (or legislative trial) at least as far as Communists are concerned. Perhaps convicts can still be excluded from union office [as they can be from the practice of medicine, *Hawker* v. *New York*, 170 U.S. 189, 191, 196 (1898)], as they must necessarily have had a judicial trial.

125, 139–40 (1939); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477–88 (1951).

Here it can in no wise be contended, as Judge Learned Hand does in the instance of due process, that the courts are usurping power of the same sort which legislators exercise (though such usurpation is justified in order to prevent frustration of the governmental enterprise). Hand, *The Bill of Rights*, 29, 39 (1958). In our situation the power of the courts *is* expressly delegated by statute, and simply serves to bring into sharper focus a telescope which has already been pointed by Congress toward the desired objective. *U.S.* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 329 (1936).

We are therefore authorized to exercise a legitimate discretion with respect to the intrinsic propriety, wisdom, or expediency of the regulations under consideration when determining their reasonableness, and not merely to pass judgment on the issue of bare power as to whether another agency of government has acted *ultra vires*. Stated differently, the distinction may be illustrated by saying that our function is somewhat comparable to an appeal in equity as distinguished from a writ of error, or to a direct appeal as distinguished from the collateral review permitted under the traditional or classical writ of habeas corpus. We must determine for ourselves on the merits the substantive question whether the result reached is right rather than merely the formal question whether someone else had power to pronounce and declare that it was right.

The By-Laws of defendant Local Union No. 153 of the Glass Bottle Blowers Association provide, in Article 2, sec. 1 that regular meetings will be held the second Thursday of each month at 8:00 P.M., unless otherwise directed. Articles 3 and 4 provide that all

offices shall be elected, by secret ballot, for a term of two years. [This is in conformity with the requirements of 29 U.S.C. 481(b)].

Article 4, sec. 12, is the crucial provision in this case. It ordains that: "No members [sic] may be a candidate unless said member is in good standing and has attended seventy-five (75%) of the regular local meetings since the last local election." This is supplemented by Art. 4, sec. 13, which provides that: "In cases where members have to work at the time of meetings, and so notify the Recording Secretary, they shall be marked present at such meetings, provided they notify the Secretary in writing within seventy-two (72) hours following the meeting."

Local 153 has approximately 500 members, of whom 11 (or 2.2 percent) were eligible for office at the challenged election held on October 18, 1963. The eligible list of eleven included the names of one Paul Gamber ("if he attends the next 2 meetings") and of one John L. Miller (with the notations "Under investigation" or "Under consideration by International"). The International on August 8 and 21, 1963, informed Miller that he was ineligible, by reason of failure to meet the attendance requirement. Miller had been Treasurer, and was proposed for nomination as President and as Treasurer at the 1963 election, but held to be disqualified under the By-Laws. Upon Miller's complaint, the Secretary of Labor filed the instant suit.

By reason of rotation in shifts, 469 members of the union are required to be at work on the date of union meetings at least six times during the two-year period of eligibility determination. Defendant computes that this means that as to 93.8% of the members, by virtue of the excusal provisions of Art. 4, Sec. 13, the 75% attendance requirement is reduced to a

50% requirement (Brief, p. 3). However, with respect to 31 workers not on rotating shifts, the 75% requirement is fully applicable without any abatement.

In view of the policy of the Act to promote equal rights among union members [29 U.S.C. 411(a)(1)] and of the terms of Section 401(e) itself, it would appear that the rights of individual members as such are at issue, and hence that we must consider the effect of the challenged By-Law in accordance with its literal terms, and as applied to the minority of members upon whom it bears hardest. *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948); *Lucas* v. *Colo. Gen. Assembly,* 377 U.S. 713 736–37 (1964).

Plaintiff urges in support of its view the following language from Regulations issued by the Secretary issued on December 12, 1959, 29 C.F.R. 452.7(b):

> (b) The question of whether a qualification is reasonable is a matter which is not susceptible to precise definition and in the last analysis will be determined by the courts. Under certain circumstances a prerequisite for such candidacy may on its face appear to be reasonable, but this would not be controlling if, as a matter of fact, the effect of its application would be unreasonable and inharmonious with the intent of the Act's election provisions. For example, a requirement that to be eligible to be a candidate for office an individual must have been a "member in good standing" for a prescribed period of time, such as two or three years, would not be, in many instances, an unreasonable qualification. However, should the actual effect of such qualification in a particular case be to disqualify from holding office all but a handful of the labor organization's members, its reasonableness would be subject to serious question.

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As plaintiff contends, the views of the Secretary are of great weight. Not only does this Court have great respect for the Secretary, but this Court agrees 100% with every word that is said in the quoted passage. The trouble is that all that is said is that the question of reasonableness is a difficult one and must ultimately be decided by the courts in the light of the facts in particular cases. We agree.

Defendant argues that the test of reasonableness here is the same as that when the constitutionality of legislation is challenged under the due process clause: in other words, that the "rational basis" rule applies. That is to say, the By-Law as adopted by the union must be upheld if a reasonable mind would have a good reason for adopting it. It must be upheld if it is rationally relevant to a legitimate regulatory purpose. As stated by Chief Justice Warren in *Bolling* v. *Sharpe,* 347 U.S. 497, 499–500 (1954): "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." A court does not act as a "superlegislature" to weigh the wisdom of regulations. *Day-Brite Lighting Inc.* v. *Missouri,* 342 U.S. 421, 423, 427 (1952); *Ferguson* v. *Skrupa,* 372 U.S. 726, 729–32 (1963).

It is then argued that such a good reason is to encourage participation in union affairs and attendance at meetings in order to become familiar with the workings of the organization before undertaking to serve as a union officer.

Another analogous situation in which courts pass on "reasonableness" is in Antitrust cases. Here, however, the insertion of that standard into the legislation as enacted by Congress is a pure judicial crea-

tion devised first by Mr. Chief Justice White in *Standard Oil Co.* v. *U.S.*, 221 1, 60, 63–67 (1911).

More to the point is the analogy to the function of the Interstate Commerce Commission, and similar regulatory agencies, in establishing "just and reasonable" rates. 49 U.S.C. 15. In other words, Congress itself enacts a nonspecific standard, the application of which to specific situations is entrusted to the judicial process of inclusion and exclusion.

The Court therefore in a particular case must not only consider the existence *vel non* of a scintilla of rational support for the rule put forth, but must (by a process similar to that prescribed in the *Universal Camera* case), take into consideration the entire situation presented by the record, and give due weight to every aspect of the facts established. In other words, the Court must also inquire whether the legitimate purpose sought to be achieved could be attained in a manner less destructive of other legally protected interests. *Schneider* v. *Irvington*, 308 U.S. 147, 162 (1939); *Henry* v. *Mississippi*, 379 U.S. 443, 447–49 (1965). We note that there may be a fairly extensive "zone of reasonableness" and that comparison with comparable practices may be a standard for determining reasonableness. *Georgia* v. *P.R.R. Co.*, 324 U.S. 439, 460–61 (1945); *Youngstown Sheet & Tube Co.* v. *U.S.*, 295 U.S. 476, 480 (1935).

Moreover, the determination must seek to give effect to the policies of the Act. Reasonableness is not to be assessed *in vacuo*, but in the light of the purposes which the Congress sought to achieve and the evils which it sought to eliminate. Union democracy, effective self-government, abolition of oligarchical cliques and self-serving union officers were in the forefront of Congressional thinking. Section 401 itself seeks to open the path of eligibility to office to all union mem-

bers in good standing, except where restrictions of reasonable character, and uniformly imposed, may be appropriate. *Mamula* v. *Steelworkers*, 304 F. 2d 108, 110–111 (1962); 86th Cong. 1st Sess. S. Rep. No. 187, p. 20, appearing at p. 16 of Vol. 1 of *Legislative History* of the Act, published by the NLRB, Washington, 1959. It must also be remembered that restrictions on eligibility also constitute a corresponding restriction on the right of choice by other members. *Fogle* v. *Steelworkers*, 230 F. Supp. 797, 798 (W.D. Pa. 1964).

Plaintiff argues that the 75% requirement has no rational relation to any legitimate labor union objective. This contention in its broad form is obviously untenable, as it is a very proper objective to encourage attendance at union meetings, and to require office holders to have acquired a sufficient familiarity with union affairs to be properly qualified to discharge their trusts effectively and in keeping with the sentiments of the membership. Past conduct is often a proper test of future fitness. [See cases collected in Dumbauld, *The Constitution of the United States* (1964) 199–200.

Plaintiff stands on more solid ground in arguing that the requirement *goes too far*. This contention is three-pronged: (1) 75% is too high a percentage; (2) the provision for excuses is too rigid, being limited only to work on the job during meetings; (3) the effect of the rule as applied here results in "only a handful" of eligibles (2.2% of membership qualified).

To select a particular percentage of attendance as being reasonable and hence permissible is akin to the task of determining what percentage of market control is necessary to establish the existence of a monopoly. On this issue a revered Judge, Learned Hand, once said "it is doubtful whether sixty or sixty-four percent would be enough, and certainly thirty-three percent is not." Ninety was enough, however. *U.S.*

v. *Aluminum Co. of America,* 146 F. 2d 416, 424 (C.C.A. 2, 1945). We conclude that 75 is too high a percentage when combined with the strict rule regarding excuses.

To be reasonable a rule must give appropriate recognition to human nature and the normal needs of a workman in his everyday life. Union members can not be expected to devote undeviating attention to union business, to the neglect of their health, family obligations, vacations and the usual pleasures and vicissitudes of life. They do not form a military community or a religious order, separated from the world at large.

A rule which limits the eligible group to 2.2% of the membership seems to be too harsh. The only judicial precedent cited by counsel is *John C. Martin* v. *Boilermakers,* W.D. Pa., Civil No. 969 Erie, where on June 26, 1963, my esteemed colleague Judge Willson upheld the reasonableness of the eligibility requirements of that union's constitution. However, the requirement there was only one meeting out of each quarter of the calendar year and the quarter immediately preceding nominations. Moreover, the provision for excuses was liberal: it recognized "personal illness, International or District or Local Lodge duties, regular employment or some other unavoidable situation." There 14 members out of a total of 175 were found to be qualified (a figure in excess of 10% of the membership).

Under these circumstances, Judge Willson said (and I agree):

> Plaintiff, however, seems to make a blank charge that the amendment requiring the attendance at one meeting during each of the five quarters to become eligible to hold office is, per se, an unreasonable regulation. However, this contention, if seriously made, is rejected be-

> cause it seems very clear to the court that the regulation is reasonable. Certainly there is nothing illegal about it, not [sic] does it appear burdensome. The rule is almost the minimum attendance requirement. It simply requires that a member attend one meeting in each three month period. But, it is to be noticed that he may be excused from that by illness or if his work interferes. The language which justifies no attendance is broad. It says: "and (d) have attended at least one (1) meeting out of each quarter of the calendar year and the quarter immediately preceding nominations for office unless prevented by personal illness, International or District or Local Lodge duties, regular employment or some other unavoidable situation." (Article XXVIII, p. 111.) To hold that such a regulation is unreasonable would hold in effect that there can be no attendance requirement whatever in this union. I find the regulations as adopted at the International Convention to be reasonable in all respects.

In order for there to be a real choice in the selection of officers, a system of screening ought to produce as eligibles at least twice the number of officers to be elected. Out of the air, I should take 10 percent of the membership as the minimum number from which nominations and elections are to be made.

Art. 3, sec. 1, of defendant's By-Laws, provides for the election of ten officers. The eligible list included only eleven names (including Gamber and Miller, thus ultimately nine or ten). This did not give the members a chance to choose between two full slates. In fact there were no candidates for four offices, and the present incumbents thereof are serving by appointment to fill vacancies, in apparent violation of

Art. 3, sec. 8, which calls for a special election from eligible candidates. But the paucity of eligible candidates would result in impossibility of performance if the procedure of Art. 3, sec. 8, were adhered to. The majority of the members preferred to avoid the expense of a special election and International representative Bonus recommended that the appointed officers continue to serve as "those members appointed will cooperate with us, if necessary, at anytime." Stipulation, Ex. D, E, and G.

Considering the combined effect of the three objections urged by plaintiff, we conclude that the requirements imposed by the By-Laws are not "reasonable qualifications" within the meaning of Section 401(e).

That is not the end of the matter, however. To direct a new election the Court must find that the violation of Section 401(e) "may have effected the outcome of an election." As was true in *Wirtz* v. *Hod Cariers,* 211 F. Supp. 408, 413 (W.D. Pa. 1962), this factor of causation has not been adequately established.

The evidence shows that complainant Miller voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-Laws but to his own voluntary unwillingness to comply therewith.

Hence it seems inadvisable to decree the holding of a new election. It will be preferable to await appropriate action enabling the next election to be held in full conformity with the Act as judicially expounded.

Each case is remanded with instructions to vacate its dismissal on the merits and to dismiss each complaint as moot.

ARTHUR S. OLICK, Assistant United States Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney and Robert E. Kushner, Assistant United States Attorney, Southern District of New York and Justin J. Mahoney, United States Attorney, Northern District of New York, on the brief), *for plaintiff-appellant.*

BERNARD T. KING, Syracuse, New York (Blitman, Carrigan & King and Nathan H. Blitman, on the brief), *for defendant-appellee Local Unions 410, 410A, 410B, and 410C, International Union of Operating Engineers.*

WILLIAM J. CORCORAN, New York, N.Y., *for defendant-respondent Local 30, International Union of Operating Engineers.*

LUMBARD, *Chief Judge*: These are two separate suits brought by the Secretary of Labor against locals of the International Union of Operating Engineers (IUOE) to set aside 1962 union elections on the ground that provisions of the IUOE's constitution, as adopted and applied by the locals, violated § 401(e) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), by depriving union members of a "reasonable opportunity" to be candidates for union office. Both district courts [1] held that the Secretary had failed to prove that any violations of the Act "may have affected the outcome" of the elections in question. 29 U.S.C. § 482(c)(2). Each

[1] *The Local 30* case was decided by the United States District Court for the Southern District of New York, 242 F. Supp. 631 (1965). The *Local 410* case was decided by the United States District Court for the Northern District of New York, 61 LRRM 2396 (1965).

local conducted an election in 1965 subsequent to the district court decision in its favor. As we hold that this fact has made both appeals moot, the two cases will be treated together in this opinion. Each case is remanded with instructions to the district court to vacate its dismissal on the merits and to dismiss the complaint as moot.

I

Local 30 is a union of licensed Stationary Engineers (those in charge of boilers, engines, pumps and refrigeration equipment in industrial plants) located in New York City and affiliated with IUOE. Local 410, located in Binghamton, New York, is an IUOE affiliate composed of journeymen engineers who operate power cranes, shovels and similar heavy equipment.

Affiliated locals must adopt the provisions of IUOE's constitution pertaining to the eligibility of union members for union office. The constitutional qualifications which prospective candidates must possess include the following:

(a) "Continuous good standing" for one year, i.e., payment of union dues on or before the first day of each month of the entire year preceding the election.

(b) The filing of a "declaration of candidacy" on or before January 15th of the election year.

(c) The filing of a non-Communist affidavit.

(d) Attendance at a majority of the regular meetings held between his declaration of candidacy and the election date.[2]

After Local 30 and Local 410 held elections in 1962 in which incumbent officers and "close associates" were elected without opposition, union members who

[2] Article XXIII, Subdivision 1, Section (b). The filing date was changed to March 15 in 1964.

had been rejected as candidates because of their failure to comply with the above requirements lodged complaints with their respective locals and, when their IUOE remedies were exhausted unsuccessfully, protested to the Secretary that they had been illegally deprived of their right to stand for office. These complaints being timely, see 29 U.S.C. § 482(a)(1), the Secretary investigated the challenged elections and brought these suits to have them set aside and conducted again under his supervision. 29 U.S.C. § 482(b).

The complaint against Local 410 charged that its "continuous good standing" rule was not a "reasonable qualification uniformly imposed," 29 U.S.C. § 481(e), and hence that members of the local had been deprived of their right to seek office. The complaint against Local 30 charged that its "declaration of candidacy" rule was likewise unreasonable and in addition that Local 30 had failed to give its members adequate notice of the 1962 election so that prospective candidates might comply with this rule. Judge Metzner agreed that the declaration of candidacy rule violated § 481(e) but held that the Secretary had failed to prove that enforcement of that rule may have affected the outcome of Local 30's election. Judge Port also dismissed the complaint against Local 410 on this ground; he assumed without deciding that the continuous good standing rule violated the Act.

Shortly after the decisions of the district courts, both locals held 1965 elections in accordance with the IUOE constitution and the LMRDA's requirement that elections be held at least triennially. 29 U.S.C. § 481(b). Thus, the present officers of each local are not holding office pursuant to the challenged 1962 elections. We conclude that, in light of the statutory

scheme in question, these subsequent elections render both cases moot.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943). Since the rights of litigants are affected by the judicial remedies available, in evaluating whether a particular appeal has become moot, attention must be focused on the particular relief sought by the appellant. See generally Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125 (1946). The exclusive remedy which Congress has created for challenging a union election, see 29 U.S.C. § 483, is a suit by the Secretary to declare the election void and to direct the conduct of a new election. This suit may only be brought after a union member has made a proper complaint to the Secretary and after the Secretary has made a finding of probable cause to believe that a violation of § 481 has occurred. Congress intentionally created a narrow remedy under Title IV of the LMRDA so that interference with union elections and management would be kept at a minimum. See *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964).

In these two cases, the Secretary has no standing to attack the 1965 elections since no member of Local 30 or of Local 410 has filed a valid complaint challenging them. See *Wirtz* v. *Local No. 125*, 231 F. Supp. 590 (N.D. Ohio 1964). It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, cf. *Cal-*

JUDGMENT

AND NOW, this 26th day of August, 1965, after trial and hearing argument of counsel and receipt of briefs, for the reasons set forth in the foregoing opinion.

IT IS ADJUDGED, DECREED, AND FINALLY DETERMINED that the action herein be and the same hereby is dismissed, the Court retaining jurisdiction of the cause for such further action, if any, as may be required in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union.

(S) DUMBAULD,
United States District Judge.

APPENDIX D

[Caption Omitted]

ORDER OF COURT

AND NOW, this 27th day of May, 1966, upon consideration of plaintiff's motion for post-judgment relief, after hearing and argument, and it appearing that the purpose of the language in this Court's judgment of August 26, 1965, "retaining jurisdiction of the cause for such further action, if any, as may be required in the event that the Secretary shall have found cause to file a complaint by reason of alleged violations of the Act of similar character in connection with the next regularly ensuing election of officers of defendant union" was to expedite and accelerate the remedying of such future complaints as might arise out of future grievances involving alleged violations of the Act of similar character to those passed upon in said opinion; and the Court being now of opinion that perhaps the inclusion of said language was improvident as perhaps being inconsistent with the statutory scheme established for dealing with and remedying such grievances or violations, but the Court being of opinion that in any event the action which plaintiff now seeks would not fall within the terms of such language; and the Court further being of opinion that in the election of October 12, 1965, with respect to which plaintiff is now seeking relief, the regulations condemned by this Court's opinion of August 26, 1965, have not been demonstrated to have affected in any respect the outcome of the election, and

that indeed such regulations did not come into play at all as there was nothing upon which they could operate, and that no candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations (see par. 9 of affidavit of Frank M. Kleiler, submitted in support of plaintiff's motion); and the Court being satisfied by the statements and assurances of defendants' counsel at the hearing of May 26, 1966, that defendants in good faith and with due diligence are taking appropriate steps with all convenient speed to reform and amend the regulations governing elections so as to bring them into conformity with the views expressed in this Court's opinion of August 26, 1965; and the Court being of opinion that the period between August 26, 1965, the date of this Court's opinion, and October 12, 1965, the date of the subsequent election with respect to which plaintiff now seeks relief, was not sufficient time in which to effect in due course the reforms required in order to bring about conformity with the views expressed in this Court's said opinion of August 26, 1965; and the Court further being of opinion that before disrupting the existing election procedure, or the results thereof, as plaintiff now seeks, because of want of conformity unto the views expressed in this Court's said opinion of August 26, 1965, defendants are entitled to await the outcome of the appeal now pending from this Court's judgment embodying said views, in order to be assured that said views are sound and acceptable legal doctrine and that the steps being taken by defendants to effect conformity therewith will not prove to have been a vain, transitory, needless and unfruitful burden,

IT IS ORDERED that the relief prayed for in said motion be and the same hereby is denied.

(S) DUMBAULD,
United States District Judge.

APPENDIX E

United States Court of Appeals for the Second Circuit

Nos. 337 and 338—September Term, 1965.
(Argued May 11, 1966 Decided August 1, 1966)
Docket Nos. 29998 and 30085

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT

v.

LOCAL UNIONS 410, 410A, 410B, & 410C, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEFENDANT-RESPONDENT

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLANT

v.

LOCAL 30, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEFENDANT-RESPONDENT

Before LUMBARD, *Chief Judge*; WATERMAN and KAUFMAN, *Circuit Judges*.

Appeals from judgments of the United States District Court for the Northern District of New York, Edmund Port, *J.*, and the United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, dismissing suits brought by the Secretary of Labor alleging violations of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), for failing to prove the alleged violations may have affected the outcome of the union elections.

hoon v. *Harvey supra,* we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot.

II

When an appeal becomes moot because of circumstances occurring after the decision of the district court, the appellate court may dismiss the appeal, or it may vacate the judgment of the district court with instructions that the complaint be dismissed as moot. See *Cover* v. *Schwartz,* 133 F. 2d 541, 546 (2 Cir. 1942), cert. denied, 319 U.S. 748 (1943). Upon this decision may turn the future *res judicata* effects of the district court's judgment. See *United States* v. *Munsingwear,* 340 U.S. 36 (1950). In order to determine the correct disposition and because the adverse nature of the decisions on the merits by the district courts may serve to deter similar suits, we proceed to consider the merits. That examination persuades us that the judgments below should be vacated.

In the Local 30 case, the evidence established that the candidacy of William Neville, a union member for 18 years and an unsuccessful candidate for office in 1958 and 1960, was rejected on the ground that he had not filed a timely declaration of candidacy. In the 1962 election that followed, only the incumbent officers appeared on the ballot. Only 607 of the union's 3,000 members voted, roughly one-half the number that had voted in the contested elections of 1958 and 1960.

In the Local 410 case, eleven members who had filed timely declarations of candidacy were declared ineligible for office because they failed to meet the continuous good standing rule. One of these eleven was a proven vote-getter who had been elected conductor and trustee in 1958 but was not an incumbent in 1962. Only incumbents and their close associates qualified for nomination and election in 1962, and only 216 out

of almost 600 union members voted in the uncontested election.

Nevertheless, both district courts held that the Secretary failed to prove that the exclusion of these members from the ballots "may have affected the outcome" of the election, § 482(c)(2), because there was no indication that persons other than those actually elected might have prevailed had the alleged violations of § 481(e) not occurred. We think that this is too restrictive a view of the burden Congress intended through § 482(c)(2) to place upon the Secretary in Title IV suits to upset union elections.

Early drafts of the LMRDA would have required proof that a violation of Title IV "affected the outcome of the election." The Senate altered this provision by adding the words "may have" with the express intent of reducing the Secretary's burden and thus of facilitating enforcement of Title IV.[3] We think this intent and the natural meaning of the proviso are served if the Secretary is required only to prove the existence of a reasonable probability that the election may have been "affected" by an alleged violation of § 481(e).

The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the

[3] See Senator Goldwater's remarks upon the change. "The Kennedy-Ervin bill * * * as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless." Legislative History of the Labor Management Reporting & Disclosure Act of 1959, at 1851 (U.S. Government Printing Office, 1959). See also the House Conference Report on H.R. No. 1147 and S. 1555, *id.* at 939.

Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8–1 margin, the proviso should prevent upsetting the election. Compare *Wirtz* v. *Local 11, International Hod Carriers,* 211 F. Supp. 408 (W.D. Pa. 1962). But in the cases at bar, the alleged violations caused the exclusion of willing candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here.

In holding that § 482(c)(2) had not been satisfied, the district courts relied on a dictum in the concurring opinion of Mr. Justice Stewart in *Calhoon* v. *Harvey,* 379 U.S. at 146 n. 7, to the effect that relief may only be had in Title IV suits when the complaining insurgent faction "approaches majority status." This would surely be true in the ballot tampering example outlined above. But to apply this standard in exclusion of candidate cases would require reliance on relatively inconclusive factors such as the excluded candidate's performance in previous years. In these cases, there was evidence that the excluded candidates were politically active union members one of whom had stood for and even won office in earlier years. In addition, the elections here complained of were uncontested, and only a small minority of the union electorate actually voted. Under these circumstances, we think the § 482(c)(2) proviso was satisfied. In

order not to leave in effect the lower courts' contrary conclusions, we vacate the judgments of the district courts with instructions that the complaints be dismissed.

III

In our opinion, it is unfortunate that these appeals are moot, for they reflect the need for appellate review in Title IV cases. The IUOE provisions in question and other IUOE candidacy requirements have been the subject of repeated attacks by the Secretary, and the district court decisions have been divided. See *Wirtz* v. *Local Union 825, IUOE, Civ.* No. 438–63 (D.N.J. 1966) (violation assumed—probable effect on outcome not proved); *Wirtz* v. *Local Union No. 406, IUOE,* Civ. No. 14573 (E.D. La. 1966) (violations found—no exhaustion of union remedies); *Wirtz* v. *Local Union No. 9, IUOE,* 51 CCH Lab. Cas. para 19,579 (D.C. Colo. 1965) (violations found—new election ordered without considering whether effect on outcome proved). Moreover, the eligibility requirements of the IUOE are the most stringent of the 68 major national and international unions, which represent 90 percent of organized labor.[4] The effect of these requirements is revealed by the fact that only 35 of the 589 members of Local 410 were eligible to stand for office in 1962. Since local elections under these requirements recur every three years, it is important that the Secretary's challenges be finally determined on the merits by an appellate court.

[4] According to the Department of Labor only two other unions refuse members any grace period in which to pay their dues in order to be in "good standing" and in neither of them must a candidate maintain his good standing for so long as the 12 months required by the IUOE. The IUOE is the only union with the pre-nomination declaration of candidacy requirement.

Title IV itself does not raise significant barriers to appellate review. While the complaining union member must attempt to invoke internal union remedies, he need only wait three months after such invocation before filing his complaint with the Secretary. § 482 (a)(2). And while the Secretary must investigate each complaint and make a finding of probable cause of a violation, he is required by § 482(b) to bring a suit challenging the election within 60 days of the filing of a complaint.

As these cases illustrate, it is the delays incident to civil cases in the district courts which create the substantial likelihood that subsequent union elections will moot Title IV cases prior to appellate review.[5] To prevent recurrence of such delays, we think the district courts should expedite the trial of Title IV cases to the greatest extent possible. In a district, such as the Southern District of New York, it would seem appropriate for such a case to be assigned at an early stage to one judge for all purposes. See Rule 2, Rules of the Southern District Court. In addition, we suggest that in a compelling case, such as one where union elections are held annually, temporary relief may be appropriate to prevent an election from mooting a pending Title IV suit by the Secretary. Of course this court is always ready to expedite such matters, upon application, by ordering an early hearing of the

[5] In Local 410 the election was held June 4, 1962 and the complaint filed by the Secretary November 26, 1962. The trial did not commence, however, until May 19, 1965. After the district court's decision the new elections were held on August 2, 1965.

In Local 30, the election was held June 12, 1962 and the complaint filed by the Secretary October 8, 1962. The trial began March 25, 1965. After the district court's order of dismissal June 17, 1965, the union held new elections on August 10, 1965.

appeal and shortening the time for docketing the record and filing briefs.

The judgments of the district courts are vacated and the cases remanded with instructions that the complaints be dismissed as moot.

PER CURIAM: The petition for rehearing is denied.

Our opinion in this case and in *Wirtz* v. *Local Unions Nos. 545, 545–A, 545–B, and 545–C, International Union of Operating Engineers*, decided September 13, 1966, point out the means available to the Secretary to prevent these cases from becoming moot and the means to expedite their disposition, as the Congress intended, so that the rights of individual union members may be suitably protected without unnecessary delay. Thus, if unavoidable or excusable delay prolongs the determination of a suit brought under 29 U.S.C. § 481 to set aside an election, and it appears that another election may be held and new officers installed, before the suit may be determined, the Secretary must make prompt and timely application to the district court to stay such election. This is what the Secretary did in *Wirtz* v. *Local Unions Nos. 545, et al.*

The district courts should give these matters prompt attention and preferential treatment. In addition, this court stands ready to do whatever may be necessary to expedite the consideration of any such matter which may be ripe for its attention.

APPENDIX F.

STATUTES INVOLVED

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, provides in pertinent part:

TITLE IV. ELECTIONS

TERMS OF OFFICE; ELECTION PROCEDURES

* * * * *

SEC. 401. (b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

* * * * *

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind of such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bar-

gaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

* * * * *

ENFORCEMENT

SEC. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body or,

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation.

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe

that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election as lawful and practicable, in conformity with under supervision of the Secretary and, so far the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers

of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

APPLICATION OF OTHER LAWS

SEC. 403. No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive.

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